TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~331.~~ 80

WILLIAM BEST, PLAINTIFF IN ERROR,

vs.

JOHN DOE, EX DEM. SARAH POLK.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

FILED DECEMBER 13, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 531.

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1 THE UNITED STATES OF AMERICA,
Northern District of Mississippi:

Civil proceedings in the district court of the United States for the northern district of Mississippi.

UNITED STATES OF AMERICA,
Northern District of Mississippi:

District court. June term, 1859.

Richard Roe was attached to answer John Doe of a plea, wherefore the said Richard Roe with force and arms entered into and upon a certain tract or parcel of land lying and being situate in the county of Tunica, in said northern district, and known and designated, according to the plan of the survey of the Chickasaw cession, as section 23, township 5, range 11 west of the basis meridian, containing six hundred and forty acres, more or less, with all the appurtenances thereunto
2 belonging, which Sarah Polk, a citizen of the State of Tennessee, hath demised to the said John Doe for a term, which has not yet expired, and ejected him from his said tract or parcel of land, and other wrongs to the said John Doe, to the great damage of the said John Doe and against the peace of the State of Mississippi; and thereupon the said John Doe, les'ee of the said Sarah Polk, (Dowd and Sykes, attorneys,) complains, that the said Sarah Polk, on the day of , 18 , in the said northern district, had demised the said tract or parcel of land with the appurtenances thereunto belonging, to the value of five thousand dollars, to the said John Doe: To have and to hold the same to the said John Doe, and his heirs & assigns, from thenceforth for and during the term of ten years thence next ensuing, and fully to be completed and ended, by virtue of which said demise the said John Doe entered upon and into the said tract and parcel of land and tenements, and appurtenances thereunto belonging, and became and was thereof possessed for the said term, &c., so to him thereof granted as aforesaid; and the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on the 1st day of January, 1858, in the
3 said northern district, with force and arms, &c., entered into and upon the said tract or parcel of land with the appurtenances thereunto belonging, in which the said John Doe was so interested in manner and form for the term aforesaid, which is not yet expired, and ejected the said John Doe out of his said tract or parcel of land, and other wrongs to him, the said John Doe, then and there did, to the great damage of the said John Doe, and against the peace and dignity of the State of Mississippi, to the great damage of him, the said John Doe, and against the peace; and wherefore he, the said John Doe, says he has been injured and has sustained damage in the sum of twenty-five hundred dollars, and therefore he sues, &c.

DOWD & SYKES,
Atto's for Plff.

Mr. WILLIAM BEST, *a citizen of said northern dist:*

I am informed you are in possession of and claim title to the premises in this declaration of ejectment mentioned, or to some part thereof, and I, being in this action as casual ejector, and having no claim or title to the same, do advise you to appear in the district court of the United

States for the northern district of Mississippi, to be held at Pontotoc, on the 1st Monday of June, 1859, by some attorney of this court,
4 and there and then, by rule of said court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgement to be entered against me by default, and you will be turned out of possession.

Yours, &c.,

RICHARD ROE.

Filed & copy issued May 2nd, 1859.

R. W. EDMONDSON, *Clerk.*

Came to hand 2nd day of May, 1859. Executed 24th May, 1859.

W. H. H. TISON,
U. S. Marshall for Northern Dist. of Mississippi.

District court. June term, 1859.

UNITED STATES OF AMERICA,
Northern District of Mississippi:

WILLIAM BEST
ats.
JOHN DOE, EX. DEMISE OF SARAH POLK.

And the said William Best, by Hugh R. Miller, his att'y, comes and defends the force and injury, when, &c., and says that he is not guilty of the supposed trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as the said John Doe hath above thereof complained against him; and of this he puts himself upon the country, &c.

HUGH R. MILLER,
Att'y for Defendant.

5 Filed June 14, 1859.

R. W. EDMONSON, *Clerk.*

In the district court of the United States for the northern district of Mississippi, at Oxford, June term, 1870.

JOHN DOE, EX DEMISE OF SARAH POLK,
vs.
WILLIAM BEST.

This cause this day came on for trial before Hon. R. A. Hill, presiding judge, and a jury duly empanneled; and on the trial the plaintiff read a patent in the following words and figures, to wit:

Certificate No. 21148.

The United States of America to all to whom these presents shall come, greeting:

Whereas James Brown, of Lafayette County, Mississippi, has deposited in the General Land-Office of the United States, a certificate of the register of the land-office at Pontotoc, whereby it appears that full

payment has been made by the said James Brown, according to the provisions of two several treaties with the Chickasaw Indians, dated October 20, 1832, and May 24, 1834, the act of Congress of the 24th of April, 1820, entitled An act making further provision for the sale of the public lands, and the several acts of Congress supplemental thereto, for the section twenty-three, in township five, of range eleven
6 west, in the district of lands subject to sale at Pontotoc, Mississippi, containing six hundred and forty-one acres, and eighty-four hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land-Office by the surveyor-general, which said tract has been purchased by the said James Brown. Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said James Brown and to his heirs the said tract above-described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said James Brown, and to his heirs and assigns forever.

In testimony whereof I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed.

Given under my hand at the city of Washington, the thirteenth day of March, in the year of our Lord, one thousand eight hundred and forty-seven, and of the Independence of the United States the seventy-first.

[L. S.] JAMES K. POLK.

By the President:

By J. KNOX WALKER,
Secretary.

7 JOS. S. WILSON,
Acting Recorder of the General Land-Office ad interim.

The plaintiff then read a deed conveying said section of land from James Brown to James K. Polk, bearing date May 1st, 1847.

The plaintiff then read the last will and testament of James K. Polk, made 28th February, 1849, duly probated in Tennessee and Mississippi, by which the said land was devised to Sarah Polk, the plaintiff. It was also proved that said land was worth $5,000.00.

The defendant then offered in evidence the following paper, to wit:

Reservations under the 6th article of the Chickasaw treaty.

No.	Reserve.	S.	T.	R.	Date.
774	Tah-pin-tah-umby	7	6	11 W.	June 17, 1839.
775	Chah-caw-mubby	10	5	11 "	" " "
776	Bah-o-nah-tubby	23	5	11 "	" " "

REGISTER'S OFFICE, *Pontotoc, Mississippi.*

I, Andrew J. Edmondson, register of the land-office of the United States, at Pontotoc, do hereby certify that the above and foregoing is a true copy of the roll, number, reserves, and locations under the 6th article of the treaty between the United States and Chickasaw Indians therein set forth, and of the lists of persons furnished by the

8 Chickasaw agent to the register and receiver as Indians entitled to land under said article of said treaty, and all of said list that relates to said Indians as the same remains of record in my office.

Given under my hand and private seal, there being no seal of office, this 2nd day of March, 1849.

ANDREW J. EDMONDSON, [SEAL.]
Register.

The plaintiff by her counsel objected to said paper, admitting that the signature was the genuine signature of Andrew J. Edmondson, but insisting at the same time that said Edmondson was not, at the date of his certificate, in office as register of the land-office at Pontotoc, and offered to furnish to the court the commission of said Edmondson, which defendant agreed might go to the court in connection with said paper; and thereupon the said commission was read and considered by the court upon the question of Edmonson being then in office, and is in the following words and figures, to wit:

JOHN TYLER, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye, that reposing special trust and confidence in the integrity, diligence, and discretion of Andrew J. Edmondson, I have nomi-
9 nated, and by and with the advice and consent of the Senate, do appoint him register of the land-office for the district of lands subject to sale at Pontotoc, in the State of Mississippi, and do authorize and empower him to execute and fulfil the duties of that office according to law, and to have and to hold the said office, with all the rights and emoluments thereunto legally appertaining unto him the said Andrew J. Edmondson during the term of four years, from the 2nd day of March, 1845, unless this commission be sooner revoked by the President of the United States for the time being.

In testimony whereof I have caused these letters to be made patent, and the seal of the Treasury Department of the United States to be hereunto affixed. Given under my hand, at the city of Washington, the twenty-first day of February, in the year of our Lord one thousand eight hundred and forty-five, and of the Independence of the United States of America the sixty-ninth.

[L. S.] JOHN TYLER.

By the President:

GEO. M. BIBB,
Secretary of the Treasury.

10 Counsel for the plaintiff then made the following objections to said paper, to wit:

1st. Said paper does not purport to be a transcript or copy of the record of the land-office.

2d. The certificate of the register, Edmondson, is dated on the 2nd of March, 1849, the day after the expiration of his term of office, as appears from his original commission here shown to the court.

3. Said certificate is not authorized to be issued by any act of Congress, because it does not purport to be a copy of a certificate of entry or purchase, or a certificate of entry and location under the pre-emption laws.

4. Said certificate states facts and legal conclusions which do not appear from the list or pretended record.

5. It states the fact that A. M. Upshaw was Chickasaw agent, and

furnished the list to the register & receiver as Indians entitled to land.

6. That it is a copy of locations under the 6th article of the treaty.

7. Said paper does not show that the list was made by the persons named in the 4th & 6th articles of the treaty, or that the agent certified to its believed accuracy, or certified as the treaty and law provides.

8. Said certificate is not founded on any order of survey, donation, pre-emption, or purchase from the United States.

11 9. Said certificate does not purport to be a copy of the plat of the general office, upon which the names of all Indian reserves are marked according to the 12th article of the treaty of 1834.

10. Said pretended certificate of location cannot be set up to defeat a patent regularly issued by the President of the United States, which is the highest title known to the law.

11. This is an action of ejectment and the legal title is alone involved, and the legal title was originally vested in the United States, and can only pass out of it by a patent or express grant by Congress.

12. A patent is unimpeachable at law, except when it appears on its face to be invalid. A court of law cannot look beyond it.

13. A patent is conclusive evidence in a court of law that all the necessary previous acts and proceedings have been taken, and no facts behind it can be investigated in a court of law.

14. The treaties of 1832 & 1834 between the United States and the Chickasaw Indians did not convey the title in fee to the Indian Bah-o-nah-tubby to the section of land sued for in this action, but the title remained in the United States until it passed out by patent.

12 The court held and decided that the said paper was incompetent testimony, and excluded the same as testimony from the jury upon the ground that it does not *not* show upon its face that it is a transcript of the entries made by the register on the books of his office, and that it does not show a list furnished by the chiefs and a certificate of its believed accuracy by the Indian agent to the register and receiver; and that if the transcript and certificate had been complete so as to have shown a proper entry of a location or a reservation it would only amount to an equitable title in the Indian. And to the decision of the court excluding said paper from the jury as evidence, the defendant, by his counsel, excepted at the time and before the jury retired, and tenders this, his bill of exceptions, which he prays may be signed and sealed and made a part of the record of the case; which is accordingly done.

Given under my hand and seal this 8th day of June, 1870.

R. A. HILL, [SEAL.]
Presiding Judge.

13 June term. 8th of June, 1870.

JOHN DOE, EX DEMISE OF SARAH POLK,
vs.
WILLIAM BEST.

This day came the parties, by their attorneys, and thereupon came a jury of good and lawful men, to wit, W. E. Elliott and eleven others, who, being elected, empanneled, and sworn well and truly to try the issue joined between the parties, upon their oaths do say that they find the issue for the plaintiff, and assess the damages at the sum of one cent. It is therefore considered by the court that the plaintiff do re-

cover of the defendant said section twenty-three, township five, range eleven, the land and premises in the declaration mentioned, together with all the damages assessed by the jury, and the costs in this cause expended.

14 *Bond to secure costs.*

Know all men by these presents, that we, Hugh A. Barr and Jordan M. Phipps, of Oxford, in the county of Lafayette, and State of Mississippi, are held and firmly bound unto D. W. Middleton, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said D. W. Middleton, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 11th day of Oct., A. D. 1871. Whereas lately, at the district court of the United States of America for the northern district of Mississippi, at Oxford, in a suit depending in said court between John Doe, ex demise of Sarah Polk, plaintiff, and William Best, defendant, judgment was rendered against the said William Best, and the said defendant having obtained a writ of error to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgement in the aforesaid suit:

15 Now, the condition of the above obligation is such, that if the said obligors shall well and truly pay, or cause to be paid to the said D. W. Middleton, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said D. W. Middleton, clerk as aforesaid, and charged to the said William Best in the prosecution of the said writ of error, then the above obligation to be void; otherwise to remain in full force and virtue.

HUGH A. BARR. [SEAL.]
JORDAN M. PHIPPS. [SEAL.]

Sealed & delivered in the presence of—

I. Robert A. Hill, presiding judge of the district court of the United States for the northern district of Mississippi, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

R. A. HILL,
Judge of said Court.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the northern district of Mississippi, greeting:

Because, in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said district court, before you, between John Doe, ex demise of Sarah Polk, plaintiff, and William Best, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this

behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and
17 according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court the 11th day of October, A. D. 1871.

[SEAL.] GEO. R. HILL,
Clerk of the District Court of the United States
For the Northern Dis. of Miss.

Allowed by— R. A. HILL, *Judge.*

18 The United States of America, greeting, to Sarah Polk or William F. Dowd, esq., attorney, &c.:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the 1st Monday of December, A. D. 1871, next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein William Best is plaintiff in error, and John Doe, ex demise of Sarah Polk, defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert A. Hill, judge of the district court of the United States of America for the northern district of Mississippi, this 11th day of October, A. D. 1871.

R. A. HILL,
U. S. District Judge for Mississippi.

On this the 17 day of October, A. D. 1871, personally appeared R. V. Reynolds before me, the subscriber, United States commissioner, and makes oath that he delivered a true copy of the within citation to William F. Dowd, esq.

R. V. REYNOLDS.

Sworn to & subscribed before me this 17 day of October, A. D. 1871.

JOHN B. SIMS,
U. S. Commissioner.

19 UNITED STATES OF AMERICA,
Northern District of Mississippi, ss:

I, Geo. R. Hill, clerk of the district court of the United States for the northern district of Mississippi, do certify that the foregoing preceeding pages contain a full and perfect transcript of the record and proceedings in the case therein mentioned, as the same remains of record in said court.

Given under my hand and seal of said court, at Oxford, the 21st day of November, A. D. 1871.

[SEAL.] GEO. R. HILL, *Clerk.*

(Indorsement on cover:) No. 531. William Best, plaintiff in error, vs. John Doe, ex dem. Sarah Polk. N. Mississippi D. C. U. S. Filed 13th December, 1871.

Supreme Court of the United States.

WM. BEST, PLAINTIFF IN ERROR,

vs.

JOHN DOE, EX DEM. SARAH POLK, DEFENDANT IN ERROR.

ABSTRACT.

Sarah Polk sued Wm. Best, in ejectment, for sec. 23, town. 5, range 11 west, in the county of Tunica, Mississippi. On the trial she read a patent for said land to James Brown, and a deed from James Brown to James K. Polk for the said land, and the will of James K. Polk devising said land to Sarah Polk.

The defendant (Wm. Best) offered in evidence a copy of the roll, number, reserves, and locations under the 6th article of the treaty between the United States and Chickasaw Indians, certified to by Andrew J. Edmondson as Register of the Land Office at Pontotoc, Mississippi, in which it appeared that said section of land had been located to Bah-o-nah-tubby long prior to the issuance of the patent to James Brown.

The plaintiff, at the same time, offered to furnish the court with the commission of said Edmondson, to show that his term of office had expired on the 2d March, 1849, when his said certificate bears date. Defendant agreed that it might go to the court and be considered; and it was so considered, and it appeared that said Edmondson was appointed register for the term of four years from the 2d March, 1845.

The plaintiff also objected to said paper as evidence, upon the ground that it did not purport to be a copy of the record of the land office; that the certificate is not authorized by any act of Congress; that it states facts and legal conclusions; that it does not show that the list was made by the person named in the 4th and 6th articles of the treaty, or that the agent certified to its believed accuracy; that it is not founded on any order of survey, donation, pre-emption, or purchase; that it does not purport to be a copy of the plat of the general office; that it cannot be set up to defeat a patent; that the legal title could only pass by a patent; that a patent cannot be impeached at law except for defects apparent on its face.

The court decided that said paper was incompetent evidence and excluded it from the jury upon the ground that it does not show upon its face that it is a transcript of the entries made by the register on the books of his office, and that it does not show a list furnished by the chiefs, and a certificate of its believed accuracy by the Indian agent to the register and receiver, and that, if the transcript and certificate had been complete, it would only amount to an equitable title in the Indian.

The defendant excepted to this ruling, and verdict and judgment were rendered for the plaintiff.

Assignment of Errors.

Wm. Best, plaintiff in error, assigns for error the decision of the court below excluding as evidence from the jury the certified copy of the location of Sec. 23, T. 4, R. 11 west as the reservation of Bah-o-nah-tubby under the 6th article of the Chickasaw Treaty.

Brief.

1st. The certificate of Andrew J. Edmondson, as register, was certainly good, as the act of a *de facto* officer. But his term of office had not expired on the 2d March, 1849. He was commissioned to hold the office of register "during the the term of four years *from* the 2d day of March,

1845." The word "*from*" always excludes the day of the date.

1 Parsons on Notes and Bills, 385, and the authorities there cited.

2d. The certificate of the register was evidence.

Revised Code of Mississippi, 517.

Hutch. Code of Mississippi, 864.

How. & Hutch. Code of Mississippi, 605.

Wray vs. Doe, 10 Smedes & Marshall (Miss.) R., 461.

3d. The certificate of the register was full, complete, and in due form.

Wray vs. Doe, 10 Smedes & Marshall (Miss.) R., 461.

4th. The 6th section of the Chickasaw Treaty reserves a section of land to Indians 21 years old, not heads of families, a list of whom was to be made out by seven chiefs (named in the treaty) and filed with the agent, and upon his (the agent's) certificate of its believed accuracy the register and receiver were to cause such reservations to be located.

7 U. S. Statutes at Large, 450.

Wray vs. Doe, 10 Smedes & Marshall (Miss.) R., 460.

5th. It is not necessary that it should be shown that the requisite preliminaries were taken to authorize the location—(that a list, including this Indian, was furnished by the seven chiefs and filed with the agent, and his certificate of its believed accuracy furnished to the register and receiver prior to the location.) The location by the register and receiver is in itself evidence that all the prerequisites have been complied with.

Wray vs. Doe, 10 Smedes & Marshall (Miss.) R., 460.

Newman vs. Doe, 4 Howard (Miss.) Reps., 555.

Hardin vs. Ho-yo-po-nubby, 27 Mississippi Reps., 578.

Polk's Lessee vs. Wendell et al., 5 Wheaton's Reps., 293.

Bouldin vs. Massie's Heirs, 7 Wheaton's Reps., 150.

United States vs. Arredendo, 6 Peters' Reps., 724.

Bagnell vs. Broderick, 13 Peters' Reps., 448.

6th. The term "*reservation*" in the treaty was equivalent to an absolute grant. The title was confirmed by the treaty, and made complete and perfect by the location.

Wray vs. Doe, 10 Smedes & Marshall (Miss.) R., 461.
Newman vs. Doe, 4 Howard's Mississippi Reps., 555.
Niles et al. vs. Anderson et al., 5 Howard's (Miss.) R., 383.
Coleman vs. Doe, 4 Smedes & Marshall (Miss.) R., 46.

7th. A patent is void as to an Indian reservee.

Wray vs. Doe, 10 Smedes & Marshall (Miss.) R., 460.
Hi-tuk-oh-mi vs. Watly et al., 7 Smedes & Marshall Miss. R., 366.
Stoddard vs. Chambers, 2 Howard Reps., 318.
U. S. vs. Arredendo, 6 Peters' Reps., 728.
New Orleans vs. U. S., 10 Peters' Reps,, 731.
Reichart vs. Phelps, 6 Wallace Reps., 160.

8th. By the treaty the register and receiver were empowered to locate the reservations, and their action is conclusive.

Comegys vs. Vasse, 1 Peters' Reps., 212.
Wray vs. Doe, 10 Smedes & Marshall (Miss.) R., 461.

It will be found that all the questions in this case are fully considered and settled in the cases of Wray vs. Doe, 10 Smedes & Marshall Mississippi Reps., 460, and Hardin vs. Ho-yo-po-nubby, 27 Mississippi Reps., 578.

J. W. C. WATSON,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

No. 80.

WM. BEST, PLAINTIFF IN ERROR,

vs.

SARAH POLK, DEFENDANT IN ERROR.

DEFENDANT'S BRIEF.

1. The defendant in error shows a perfect chain of title, derived from the United States to herself—

1. By letters patent from the United States, dated March 13, A. D. 1849, to James Brown.
2. A deed from the patentee to James K. Polk, May 1, A. D. 1847.
3. A *devise* by James K. Polk to his wife, defendant in error, by will probated February 28, A. D. 1849.

This Court, in the case of Minter and al. *vs.* Crommelin, reported in 18 Howard, page 88, holds the following language: "The presumption is that the patent is valid. It is *prima facie* evidence of itself that all the incipient steps have been regularly taken before the title was perfected by the patent."

2. The "*paper*" offered in evidence by the plaintiff in error and rejected by the Court, if competent and admissible, could be so for one purpose only, and that was to disprove the seizin of the defendant in error.

The plaintiff in error offered no evidence whatever, in any wise, to connect himself with the alleged outstanding title.

See Wolcott and al., 6 Mass. Rep., p. 418.
Green *vs.* Watkins, 74 Wheaton, p. 27.

Indian title, at best, is one of mere occupancy, the legal title being in the United States.

1 Kent's Com., p. 242.
Johnson *vs.* McIntosh, 8 Wheaton, p. 543.

Legal Presumptions.

3. The argument of legal presumptions, urged by the plaintiff in error, arising from the assumed acts of the register of the land office of Pontotoe, applies with redoubled force to the clearly shown acts of the Commissioner of the General Land Office and the President of the United States.

It is legal presumption *vs.* legal presumption; and the legal presumption flowing from the acts of the Land Office and the President are as much stronger, as the care, responsibility, and dignity of the latter officers are greater than the former—the former being subordinate to the latter.

4. If the plaintiff in error, a stranger to the title he would invoke, for the purpose of defeating the patent, can do so, it can only be done by clearly and affirmatively showing that the United States had incapacitated itself from patenting the land at the time and in the manner it attempted to do so. It cannot rest on mere presumptions alone.

Can the Court here say, looking at the "paper" offered in evidence, assuming it to be just what it is, and apart from the certificate of the register, which at most can only verify it as a correct copy, it can overthrow and defeat the formalities of *letters patent* and all the legal presumptions lying behind a grant?

If it be so, then titles hang upon a slender thread.

II.

The "paper" offered was not competent evidence, or admissible, for any purpose.

The act of January 23, 1823, 3 Stats. at Large, page 721, prescribes how copies of papers relating to land titles may be verified. And since the creation of the Department of the Interior, and the transfer of the Land Office to that Department, the records of that Department are to be verified as records of the State Department were, under the act of 1789.

1 Stats. at Large, sec. 5, p. 69.

And see also 10 Stats. at Large, p. 297.

Also see Brightly's Digest, p. 267, and foot notes.

1. The "paper" offered was not authenticated in the manner prescribed by statute. It should have been certified by the Commissioner of the Land Office, under the seal of the Department of the Interior, accompanied with the *survey*, *maps*, and *reservations marked* thereon, as they must be if the record exists.

It was the duty of the register to make *monthly* and *quarterly* returns to the Commissioner of the General Land Office of his doings in office, concerning this and all other reservations.

Such returns were not only required by law, but the administration of the Land Office made such returns indispensable. The 12th article of the treaty required it to be done.

The "paper" offered in evidence was not, in its character, the best evidence the nature of the case afforded, and of the fact sought to be proven. It did not emanate from the right source. It was inferior in its character to other evidence existing, if existing at all.

2. The "paper" offered was inadmissible, because the officer certifying, and at the time he certified, was not in office. The day of the date of his commission is to be included within the computation of the four years. His

office, or term of office, expired on the night of March 1, 1849. And such is understood to be the practice and holding of the Government. It is in analogy to the rule of law for computing time under the statute of limitations. Any facts stated in the certificate, extraneous to what appears on the face of the alleged record, are of course not admissible as evidence. It is the mere statement of a third person not under oath, and not in conformity to any law of evidence.

1 Greenleaf on Evidence, sec. 498.

The "paper" offered, taken by itself, is not intelligible; it is manifestly incomplete.

The fact that a certificate of a copy of a record, which if in existence in 1849 is in existence still, was offered in evidence, made out and certified to by a register out of office, in 1849, when one of a later date could be as readily obtained, is very suggestive that no such record existed on the books of the office of the register, as is certified to, and that such a record cannot now be found on the books of the register.

It may be a mere statement of the register, made after his term of office expired, and not to be found on the records of the register's office at Pontotoe, or in the office of the General Land Office. It does not purport to be the whole record pertaining to the subject-matter. No reference is made to any volume, page, or book of Indian Reservation Records, or as part of any such record, or being extracts therefrom.

It is altogether to loose, indefinite, and uncertain a foundation to rest title to real estate upon.

3. The 6th article of the treaty did not vest a fee-simple estate in any one of the class of beneficiaries therein enumerated and provided for.

The *reservee* could not alienate without the consent of the President. The reservation before it could take effect must have the approval of the General Land Office.

The reservations contemplated in the 6th section of the treaty were wholly prospective, resting in contract and upon conditions precedent. The language of the treaty is not, *that there is granted*, but it is, *there shall be granted.*

A list of the beneficiaries is to be made by certain persons named. This list of names is to be filed with the Indian agent, and he is to certify to its correctness to the register; and the register is to locate the reservation upon lands fit for cultivation, but not to interfere with the rights of settlers. The lands, therefore, must have been surveyed prior to the location.

Surveys, *maps*, and *plans* were in existence. Even if the reservation contemplated became fully vested, in the event of the death of the *reservee* without wife or children, it became the duty of the Land Office to sell and patent the land, and to carry the proceeds to the credit of the general Chickasaw fund.

III.

Looking at the recitals in the patent, it is a matter of legal presumption that it properly issued under some one of the provisions of the treaty, and not until proper investigations had been made.

For all that appears in the Record, *Bak-o-nah-tubby* may be a *myth*, and that no such person ever existed.

The cases cited and relied upon by the plaintiff in error from the State of Mississippi will be found to be cases where the action was in the name of the Indian reservee himself, or of those claiming under him, by title lawfully derived, with the proper assent, of the authorities of the United States.

The defendant in error *reiterates* and relies upon the several objections to the admissibility of the paper rejected by the Court, in the Record, numbered from one to fourteen, inclusive.

IV.

The plaintiff in error assigns but one error, viz, the rejection of the "paper" offered in evidence. His objection may be considered in two aspects—

1. Was the paper, in the manner and form presented, admissible under the rules of evidence?

2. What shall be the effect of the evidence if admitted?

It was not admissible in evidence for the reasons shown. If admissible, it could not defeat the defendant's title.

At the date of the treaty the title to the premises was indisputably in the United States. The cases cited in plaintiff's brief, arising under the Louisiana and Florida treaties, have no application to these cases—there the fee never vested in the United States. The disputes in those cases arose, whether the title had or had not vested in the grantees prior to the date of the treaties. It was a mere question of *severance*. And so, in the case of *Reichart* vs. *Felps*, 6 Wallace, page 165, Justice Grier says, "It is not a grant by the United States, because title was not in them.

The deed of cession to the United States, under which it claimed title, contained a *reservation* of the possession and titles of actual settlers, and provided that these titles and possessions should be confirmed unto the settlers. It having been done so, the Court very properly held, that a subsequent grant by the United States of the same lands was void.

If the evidence offered had been admitted for what it is legally worth, it would not have availed the plaintiff in error any benefit.

The title of the *reservees*, an unknown and uncertain class of persons, to be ascertained thereafter in a particular way and manner, and on specific proofs, and applicable to no certain or specific tract of land, was a "*float*" in a double sense. It was a "*float*" as to the person of the grantee, also to the subject-matter of the grant.

In Ceus et al. *vs.* Burcham et al., 1 Black, page 352, it

was held, that the treaty with the Pottawatamie Indians, similar in its language and import to the treaty with the Chickasaws, *merely created an* equitable estate in the *reservee* to the land reserved.

Furthermore, by the fourth article, no *reservee* under the treaty, who became a beneficiary, could alienate or transfer his land without the assent of the head men of the tribe and the President of the United States, whose approval of the sale must be endorsed on the deed of the transfer. (Doe et al. *vs.* Wilson, 23 Howard, p. 463.) This restriction applies to the class of beneficiaries under the 6th article of the treaty as well as to the other reservees.

In the case of Pet-chico's sale, under the Pottawatamie treaty, in Doe *vs.* Wilson, Justice Catron says: "The Indian title is property, and alienable, unless the treaty prohibits the sale."

The Chickasaw treaty prohibited sales, except *sub modo*, while the Pottawatamie does not.

For aught appears the United States patented the land under the 6th article of the treaty, by reason of the death of the reservee without heirs.

Again, the reservation if made, and lawful, might have been withdrawn for various reasons. It might have been found not to be land suitable for cultivation, or might have conflicted with settlers' rights.

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5	Wheaton	293
7	"	150
6	Petty	724 —
13	"	448 —
2	Howard	318
10	Petty	731 —
6	Walden	160
1	Petty	212
1	Black	852 —